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No. 82-593

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF BURBANK, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether this suit is barred by res judicata and collateral estoppel as a result of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980).

2. Whether Congress may condition the availability of federal unemployment tax credits for private employers and federal grants within a particular state upon the state's extension of unemployment compensation coverage to the employees of the state and its political subdivisions.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The district court's order of dismissal (Pet. App. 6a-7a) also is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on July 6, 1982. The petition for a writ of certiorari was filed on October 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[1]

Petitioner brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, which provide for the extension of unemployment compensation under state law to state and local government employees, are unconstitutional under the Tenth Amendment. These amendments provide for denial of tax credits against the federal unemployment tax for private employers within a state if that state government fails to extend unemployment compensation to its employees. Petitioner also sought an injunction restraining the termination of tax credits for private employers and the termination of federal grants that otherwise would result in states which fail to comply with these federal statutory amendments (Pet. App. 82a-84a). Finally, petitioner sought a refund from the federal government of unemployment insurance contributions in the total amount of $123,599.84 that it had paid under state law to the State of California (Pet. App. 78a-82a).

Under the pertinent provisions of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. (& Supp. IV) 3301 *et seq.*), Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31. The certification of the Secretary

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[1]The statement that follows is substantially the same as in our conditional cross-petition in this case (No. 82-762), which we have filed pursuant to Sup. Ct. R. 19.5. That petition seeks review of the jurisdictional and standing questions presented, but only if the Court grants the instant petition.

of Labor is the prerequisite for tax credits for private employers subject to the state law and for federal grants of money.

Section 3301 currently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 59a-60a) to

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[2]See 26 U.S.C. 3301(a) and 3306(b)(1).

[3]26 U.S.C. 3302(a)(1).

[4]See 26 U.S.C. (& Supp. IV) 3302(a)(1), (c), and (d)(1).

[5]See Sections 301-303 of the Social Security Act, 42 U.S.C. (& Supp. IV) 501-503.

[6]See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as private employees. These amendments (the "1976 Amendments") apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed petitioner's complaint with prejudice on the ground that it was barred by res judicata as a result of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980) (Pet. App. 6a-7a).

The court of appeals affirmed (Pet. App. 1a-5a). It agreed with the district court that petitioner's claim for declaratory and injunctive relief was identical to the claim adjudicated in *County of Los Angeles*, so that petitioner's suit was barred by res judicata. The court of appeals further held that petitioner's claim for a refund was barred by collateral estoppel. As the court concluded, petitioner's claim for a refund turns on the same constitutional issues that the court in *County of Los Angeles* was required to resolve and did resolve in deciding the claim for equitable relief (Pet. App. 3a-5a). Neither of the courts below addressed petitioner's constitutional arguments or the federal government's jurisdictional and standing defenses.

ARGUMENT

1. The court of appeals correctly held that petitioner's suit is barred by res judicata and collateral estoppel. There is accordingly no occasion to pass upon the merits of its constitutional challenge to the 1976 Amendments to the

Federal Unemployment Tax Act. See, e.g., *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979).[7]

This suit is barred because of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall, supra,* (Pet. App. 8a-13a). That suit likewise sought a declaratory judgment that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment, and an injunction restraining the enforcement of those amendments. The grounds were the same as alleged here: viz., that Congress' conditioning the availability of the FUTA credits and federal grants upon the extension under state law of unemployment compensation coverage to state and local government employees violates the states' Tenth Amendment rights, and also that the cost of such coverage is an excessive federal tax upon states and local governments. As the court below observed (Pet. App. 4a and n.2), petitioner concedes that the legal basis for its present complaint is the same as the legal basis for its complaint in *County of Los Angeles.* The only relevant difference between this suit and *County of Los Angeles* is that here petitioner also seeks a refund from the federal government of the unemployment insurance contributions that it has paid to the State of California.

In *County of Los Angeles*, the court of appeals rejected the challenge to the constitutionality of the 1976 Amendments (631 F.2d at 769). This suit is therefore barred by res judicata and collateral estoppel. *Montana* v. *United States*,

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[7]For the reasons set forth in our conditional cross-petition in this case (No. 82-762), this suit is also barred by the Anti-Injunction Act and the Declaratory Judgment Act, Appendix, *infra*, 1a, and by the doctrine of sovereign immunity. Moreover, petitioner lacks standing to bring this suit. While the courts below did not address the jurisdictional and standing defenses, they furnish independent and fully sufficient grounds for the dismissal of petitioner's complaint.

440 U.S. 147, 153 (1979). Petitioner's claim for declaratory and injunctive relief is barred by res judicata because the identical claim was resolved against petitioner in *County of Los Angeles*. Similarly, petitioner's claim for a refund is barred by collateral estoppel because the constitutional issues upon which that claim turns likewise were determined against petitioner in *County of Los Angeles*.

Contrary to petitioner's assertion (Pet. 28-29), the decision in *County of Los Angeles* resolved all of the constitutional issues presented. The court did not fail to decide the entire case simply because it adopted the reasoning of *State of New Hampshire* v. *Marshall*, 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980), which rejected an identical constitutional challenge to the 1976 Amendments (Pet. App. 31a-52a). Petitioner also errs in urging (Pet. 29-30) that the issues presented in the instant case are so important that the bars of res judicata and collateral estoppel should be disregarded. As this Court has admonished, "[t]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts * * *." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), quoting from *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

3. At all events, the 1976 Amendments to FUTA are constitutional. Two courts of appeals have sustained them against Tenth Amendment challenges identical to that made by petitioner here. *State of New Hampshire* v. *Marshall, supra*, 616 F.2d at 240; *County of Los Angeles* v. *Marshall, supra*. There are no decisions to the contrary. This Court, moreover, has rejected petitioner's argument (Pet. 11-13) that the FUTA tax operates coercively upon

the states. In *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585 (1937), the Court held that the FUTA tax "is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." Accord, *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). The Court recently has described the current national unemployment scheme as "federal involvement primarily through *tax incentives* to encourage state-run programs" (emphasis supplied). *New York Telephone Co.* v. *New York Labor Department*, 440 U.S. 519, 537 n.28 (1979) (quoting from *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 483 (1977)). See also, *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 310 (1943).[8]

It is therefore settled that the FUTA tax and credit scheme does not operate coercively upon the states. In so arguing, we do not suggest that the credit, and the several other substantial benefits to the states that arise from participation in the federal-state unemployment compensation system, do not present an attractive incentive. A tax credit that diverts billions of dollars of federal revenue to the states may be too attractive to decline. That fact, however, does not create an unconstitutional coercion. Tax incentives do not become penalties simply by reason of their attractiveness.

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[8]The FUTA tax credit was modeled after the former federal estate tax credit (up to 80% of the federal tax) for payment of state inheritance taxes. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). The Court upheld that credit against the charge that it coerced Florida into enacting an inheritance tax and injured that State by inducing potential taxpayers to withdraw property from the State. *Florida* v. *Mellon*, 273 U.S. 12, 17-18 (1927). Cf. Section 2011 of the Internal Revenue Code of 1954 (26 U.S.C.).

Since the Federal Unemployment Tax Act is not a federal mandate imposed upon the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), has no bearing upon this case. *National League of Cities* involved the mandatory extension of federal minimum wage and maximum hour requirements to employees of state and local governments. The Court held that these mandatory requirements abridged the Tenth Amendment rights of the states. As the Court stated (426 U.S. at 852; footnote omitted): "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." Thus, *National League of Cities* addresses only the use of the federal commerce power[9] "to directly displace" traditional state government functions. It has no application to federal programs undertaken, at the option of the states, in response to federal incentives. A state either may accept the federal conditions, and thereby receive the statutory benefits, or it may decline to participate. An unbroken line of decisions of this Court has held such "conditional" federal benefit statutes to be constitutional. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *State of North Carolina ex rel Morrow* v. *Califano*, 445 F. Supp. 532, 535-536 & n.10 (E.D. N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978). Furthermore, as

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[9]The Court confined the rationale of *National League of Cities* to Commerce Clause powers. It stated (426 U.S. at 852 n.17):

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

the First Circuit observed in *State of New Hampshire*, the 1976 Amendments do not significantly alter or displace the ability of the states to structure employer-employee relationships. Unlike the minimum wage provisions condemned in *National League of Cities*, "FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees." *State of New Hampshire, supra*, 616 F.2d at 248.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. & Supp. IV):

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

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28 U.S.C. (Supp. IV):

SEC. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.